Supreme Court, U.S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1807

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

The Arkansas, 17 F. 383 2

Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 ..... 3, 4

Florida East Coast Ry. v. *United States*, 519 F. 2d 1184 4

Graci v. *United States*, 456 F. 2d 20 5

Kelly v. *Smith*, 485 F. 2d 520 3

National Mfg. Co. v. *United States*, 210 F. 2d 263 4

Peterson v. *United States*, 367 F. 2d 271 5

Sanborn v. *United States*, 453 F. Supp. 651 4

Taylor v. *United States*, 590 F. 2d 263 5

Statutes:

Suits in Admiralty Act, Section 2, 46 U.S.C. 742 1

33 U.S.C. 702c 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1807

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the flooding of its insured's building, allegedly caused by water control activities of the United States Army Corps of Engineers, gives rise to admiralty jurisdiction under Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742.[1]

1. Petitioner, as subrogee to the rights of a steel company whose warehouse suffered damage when the Cumberland River flooded during an abnormally heavy rainfall, brought suit in the United States District Court

---

[1]Section 2 provides in pertinent part:

> In cases where * * * if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *.

for the Middle District of Tennessee alleging that the flooding was caused by the negligence of the Army Corps of Engineers in releasing water over dams it maintained in the area. Petitioner sought to invoke admiralty jurisdiction on the theory that the location and nature of the injury and the activities of both petitioner and the Corps of Engineers were related to maritime navigation and commerce (Pet. 8-14). The district court concluded that it lacked jurisdiction and granted the government's motion to dismiss, holding that neither the location of the injury nor the activities involved were sufficiently maritime to warrant invocation of admiralty jurisdiction (Pet. App. 11a). In addition, the court concluded that the issues in this case could be resolved without resort to the unique principles of admiralty (Pet. App. 14a) and that petitioner was free to pursue its remedies under the Federal Tort Claims Act (Pet. App. 16a). The court of appeals affirmed, relying on the reasons set forth in the district court's opinion (Pet. App. 1a).

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is unwarranted.

First, the wrong complained of did not occur on navigable waters. As the district court observed (Pet. App. 10a-11a; footnote omitted), "the warehouse was * * * an integral part of [the shore], whose contiguity to navigable water was the freak result of a flood. Under ordinary conditions, the warehouse would never have been within the flow of the Cumberland, even at its high-water mark, which is traditionally considered the outer limits of a navigable stream for purposes of recognizing admiralty jurisdiction." The situation here is like that in *The Arkansas*, 17 F. 383 (S.D. Iowa 1883), wherein the court concluded that admiralty jurisdiction did not extend to claims arising out of a collision between a flood-tossed

ship and an oil depot situated on dry land. "The plaintiff's property was unquestionably situated upon land, and not upon the water or within the river. It would be doing violence to language to say that the oil depot in question was not upon land. Can we, then, say that because the river, in an extraordinary and unusual flood, rose up to and around the oil depot, and floated the steamer upon the plaintiff's property, the tort complained of was not upon land?" *Id.* at 389. Were such the case, "admiralty jurisdiction [w]ould come and go with the rise and subsidence of the river, to be succeeded in its turn by that of the common law * * *." *Ibid.*

Second, the injury sustained in this case was not sufficiently related to traditional maritime activity to justify admiralty jurisdiction. *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972).[2] Several factors have been identified as useful guides in determining whether a maritime nexus exists: the functions and roles of the parties to the alleged tort; the types of "vehicles and instrumentalities" involved; the cause of and type of injury; and the applicability of "traditional concepts of the role of admiralty law." *Kelly* v. *Smith*, 485 F. 2d 520, 525 (5th Cir. 1973). Here, the injured party, a steel company, does not engage in maritime activity. The alleged tortfeasor, the Army Corps of Engineers, constructs and maintains flood control projects, but that activity is directed primarily at promoting commercial activity on land. The injury complained of was caused by flooding following a severe rainstorm, and not by the negligent

---

[2]As petitioner recognizes (Pet. 11), this Court stated in *Executive Jet* (409 U.S. at 261) that, "in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

operation of a ship or other maritime instrumentality. And neither the flooding nor the circumstances under which it is alleged to have occurred touches upon "matters with which admiralty is basically concerned." *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra*, 409 U.S. at 270. Thus, the court below correctly concluded that petitioner failed to satisfy the maritime nexus test.

3. Even assuming *arguendo* that petitioner asserted a claim cognizable in admiralty, there exists an independent bar to recovery. 33 U.S.C. 702c provides, in pertinent part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." The statute was intended to apply to precisely the situation in this case. "The language used shows Congressional anticipation that it will be claimed after the happening of floods that negligence of government employees [in operating flood control projects] was a proximate cause of damages where floods or flood waters have destroyed or damaged goods." *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 271 (8th Cir.), cert. denied, 347 U.S. 967 (1954). This immunity from liability is complete. It applies where flooding is caused in part by the negligent design of a flood control project (*Florida East Coast Ry.* v. *United States*, 519 F. 2d 1184, 1191-1193 (5th Cir. 1975)), where negligence is the sole cause of the flooding (*Sanborn* v. *United States*, 453 F. Supp. 651 (E.D. Cal. 1977)), and where the waters involved are backwaters as distinguished

from floodwaters (*Taylor* v. *United States*, 590 F. 2d 263 (8th Cir. 1979)). It accordingly is applicable here.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

---

[3]Some cases have limited Section 702(c) immunity to claims arising out of the negligent design, construction, operation or maintenance of federal flood control projects. See, *e.g.*, *Graci* v. *United States*, 456 F. 2d 20, 25-27 (5th Cir. 1971); *Peterson* v. *United States*, 367 F. 2d 271, 275-276 (9th Cir. 1966). However, inasmuch as the injury complained of by petitioner allegedly resulted from flood control operations engaged in by the Army Corps of Engineers, the United States is immune from liability even under a narrow reading of the statute.